Supreme Court, U.S.
FILED
JAN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-684

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MAINE, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Under Section 110(a)(2)(E) of the Clean Air Act, 42 U.S.C. 7410(a)(2)(E), individual State plans for implementing the Act's air quality requirements must include provisions adequate to prohibit "any stationary source within the State from emitting any air pollutant in amounts which (I) will prevent attainment or maintenance by any other State of [a national air quality] standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State * * * to prevent significant deterioration of air quality or to protect visibility * * *." The questions presented are:

1. Whether Section 126(b) of the Clean Air Act, 42 U.S.C. 7426(b), which allows a State to petition the Environmental Protection Agency (EPA) "for a finding that any major source emits or would emit any air pollutant in violation of Section 110(a)(2)(E)(i)," requires EPA to review the adequacy of the existing state implementation plans of all States in which sources named in the petition are located to determine whether those sources are causing a violation of the Act's standards within the petitioning State.

2. Whether EPA acted arbitrarily and capriciously in denying the State of Maine's Section 126(b) petition.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 852 F.2d 574.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1988 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on October 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act, 42 U.S.C. 7401 *et seq.*, establishes a joint state and federal program to control the Nation's air pollution. The Act calls for the establishment and achievement of primary and secondary national am-

bient air quality standards (NAAQS). Primary standards are those necessary to protect public health with an adequate margin of safety (42 U.S.C. 7409(b)(1)); secondary standards are those necessary to protect the public welfare (42 U.S.C. 7409(b)(2)). Under the Act, the Environmental Protection Agency (EPA) is responsible for establishing both sets of standards (42 U.S.C. 7409), but then each State must adopt a plan providing for the "implementation, maintenance, and enforcement" of such standards within each air quality control region within the State (42 U.S.C. 7410(a)(1)). The state implementation plans (SIPs) must be prepared within nine months of EPA's promulgation or revision of a NAAQS and must specify emission limitations and other measures necessary to implement the standards, including control requirements for existing pollution sources (42 U.S.C. 7410(a)(2)(A)-(K)). EPA reviews all initial and revised SIPs to ensure that the Act's requirements are met (42 U.S.C. 7410(a)(2)-(3)), and EPA must itself promulgate a federal implementation plan for a State that fails to submit a SIP meeting the Act's requirements (42 U.S.C. 7410(c)).

Sections 110(a)(2)(E) and 126 of the Act are concerned with interstate air pollution. Section 110(a)(2)(E) requires that each SIP contain measures that prohibit a "stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any [NAAQS], or (II) interfere with measures required to be included in the applicable [SIP] for any other State under [the Act's provisions regarding protection of visibility on certain federal lands and the prevention of significant deterioration (PSD) in certain areas of high air quality]" (42 U.S.C. 7410(a)(2)(E)); see 42 U.S.C. 7470-7491 (PSD program)). Section 110(a)(2)(E) also requires that each SIP contain measures "insuring

compliance with the requirements of [Section 126 (42 U.S.C. 7426)]."

Section 126, in turn, establishes procedures for identifying and addressing the types of interstate air pollution proscribed by Section 110(a)(2)(E). SIPs must require that certain new sources notify nearby States of prospective interstate impacts before commencing construction (42 U.S.C. 7426(a)(1)); and States must identify existing sources that may have significantly contributed to violations of the ambient standards in other States and must have provided "nearby" States with the identity of such sources within three months of the enactment of the 1977 Clean Air Act Amendments (42 U.S.C. 7426(a)(2)).[1]

Section 126(b) establishes a procedural mechanism that allows States and other governmental entities to petition EPA for a finding that a "major source" [2] in another State is operating (or will operate) in violation of the substantive prohibitions contained in Section 110(a)(2)(E). 42 U.S.C. 7426(b). Under Section 126(b), EPA must convene a public hearing and render a decision within 60 days of receipt of a petition. Section 126(c) prohibits any new or modified source from being built or operated in violation of the Act's interstate requirements, and requires that existing sources found by EPA to be in violation either cease operations within three months or submit to a schedule designed to ensure compliance with control requirements that eliminate the impermissible interstate pollution as expeditiously as practicable.

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[1] Pub. L. No. 95-95, 91 Stat. 685.

[2] A "major stationary source" is defined in Section 302(j) to "mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant * * * " (42 U.S.C. 7602(j)).

2. On December 19, 1980, petitioner Commonwealth of Pennsylvania petitioned EPA for relief pursuant to Section 126(b), claiming that sulfur dioxide (SO_2) emissions from 38 specific sources in West Virginia and Ohio were preventing attainment and maintenance of SO_2 NAAQS in four Pennsylvania counties (Pet. App. A6, B3). Pennsylvania subsequently amended its petition to allege that all major sources of SO_2 and particulate matter in a five-state region were responsible for violation of applicable NAAQS throughout Pennsylvania (*ibid.*). In December 1980 and in January 1981, respondent State of New York also petitioned EPA for relief pursuant to Section 126(b), asserting that the conversion into sulfate particulates of SO_2 emissions from 19 sources in a six-state region was preventing New York from complying with applicable particulate NAAQS (Pet. App. A6, B3-B4). New York also claimed that the emissions interfered with applicable visibility and PSD requirements (Pet. App. B3-B4). Finally, petitioner State of Maine filed a Section 126(b) petition in October 1981, alleging that sulfate particulates derived from SO_2 were interfering with its ability to comply with PSD and visibility requirements (Pet. App. A7, B4). Maine's petition sought relief from sources in seven midwestern States, without mentioning any emissions from Pennsylvania, New York or any of the other eight States located between Maine and the Midwest (*ibid.*).

On June 18 and 19, 1981, EPA held a public hearing on the petitions filed by Pennsylvania and New York and, following Maine's subsequent filing of its petition in October 1981, EPA consolidated all three petitions for its consideration (Pet. App. B4; 46 Fed. Reg. 55551 (1981)). The three States and more than 60 other parties filed written comments on the petitions with EPA, which on September 4, 1984, published its proposed disposition of

each of the petitions. See 49 Fed. Reg. 34851-34866 (see Pet. App. B5).

EPA proposed denial of Pennsylvania's petition on the ground that Pennsylvania had failed to establish the prerequisites to relief under Section 126(b) (Pet. App. B5-B8). EPA's proposed findings stated that Pennsylvania's evidence was insufficient to support its claim that out-of-state sources prevented attainment or maintenance of the SO_2 NAAQS in the three areas at issue (*id.* at B6).[3] Pennsylvania did not attempt to support its broader interstate pollution claim.

EPA also proposed denial of New York's petition, including its claim that sulfate particulates originating from out-of-state sources were contributing impermissibly to violations of particulate NAAQS in western New York (Pet. App. B5-B6, B7-B9). EPA based its proposed denial on, *inter alia,* its findings that sulfates from all sources were responsible for only a low percentage of particulate levels and that the claimed violations of the particulate standard were not reliably established (*id.* at B7-B8).

Finally, EPA proposed denial of Maine's petition (Pet. App. B5-B6, B7-B9). According to EPA's proposed findings, Maine's claims of "regional haze" fell outside the scope of Section 126(b) because Maine had not alleged that major sources located in other states were interfering with visibility protection measures contained within its SIP (Pet. App. B9). Maine's SIP did not include visibility measures then contained in federal regulations (*ibid.*).

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[3] EPA found that in one area the modeling study predicting violations (the Cramer study) was only preliminary in view of its reliance on emissions and meteorological data of uncertain accuracy; in the second area no violations were predicted; and in the final area a violation was predicted at only one small site and was primarily the product of in-state sources. See Pet. App. B6-B7.

Following a period of notice and comment on its proposed findings, EPA published its final decision on December 10, 1984. See 49 Fed. Reg. 48152-48157 (Pet. App. B1-B25). EPA denied each of the three petitions, concluding that each State had failed to demonstrate that out-of-state sources had contributed significantly to violations of NAAQS or visibility or PSD requirements within the petitioning State (Pet. App. B24).

3. Pursuant to Section 307 of the Clean Air Act, 42 U.S.C. 7607, petitioners and respondent New York petitioned the United States Court of Appeals for the District of Columbia Circuit for review of EPA's denial of the three Section 126(b) petitions. The court of appeals affirmed, but remanded New York's petition for further proceedings to allow New York to submit new data relevant to a new NAAQS for particulates promulgated by EPA in July 1987 (Pet. App. A1-A17).

The court of appeals rejected petitioners' contention that "the filing of their section 126(b) petitions immediately obliged EPA to take the investigatory steps necessary to determine whether the SIPS in all named upwind states were in compliance with § 110(a)(2)(E))" (Pet. App. A8). The court instead agreed with the EPA Administrator that "his responsibility to evaluate SIPs for compliance with § 110(a)(2)(E) is linked to his review of an otherwise required submission by a state" (Pet. App. A8). The court of appeals explained that EPA's construction was supported by the language of Section 126(b), which "focuses on 'major sources,' not the validity of a state's SIP" and which requires that "the Administrator take * * * action on a section 126(b) petition very quickly" (Pet. App. A9-A10). The court also found that the language of Section 110(a)(2), which "contains no language expressly directing the Administrator to reevaluate existing SIPs" likewise supports the Administrator's view (Pet. App. A9, A10).

"When Congress has intended to establish a requirement for direct EPA action," the court explained, "it has said so" (*id.* at A10).[4]

Finally, the court of appeals concluded that EPA had not acted arbitrarily and capriciously in denying any of the three petitions (Pet. App. A12-A16). The court agreed with EPA that "[b]ecause Maine's claims in this proceeding concern only the problem of regional haze, Maine has not presented any claim which falls within the ambit of § 126(b)" (Pet. App. A13). The court next reviewed EPA's assessment of the scientific evidence relied upon by Pennsylvania and concluded that the EPA had not acted unreasonably in finding that the evidence failed to show that out-of-state sources contributed significantly to violations of the Act's standards in Pennsylvania (Pet. App. A14-A15). Because, however, EPA had recently promulgated a new NAAQS for particulate matter relevant to New York's petition and did not object "to a remand for submission of new data rather than dismissal with leave to re-petition," the court remanded New York's petition for that limited purpose (Pet. App. A16).

Judge Ruth B. Ginsburg joined the court's opinion and also filed a separate opinion (Pet. App. A16-A17). The concurrence explained that "Congress, when it is so minded, is fully capable of instructing the EPA to address particular matters promptly" but "did not supply such direction in this instance * * *." *Ibid.*

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[4] The court also rejected petitioners' contention that Section 406(d)(2) of the 1977 Amendments created an independent duty for the Administrator to revise all existing SIPs. The court concluded that "§ 406(d)(2) only sets the timetable for actions to revise an SIP 'by reason of any amendment made by this Act' * * * [and] itself creates no independent obligation to revise an SIP" (Pet. App. A11).

ARGUMENT

1. The court of appeals correctly rejected petitioners' contention that EPA must investigate the adequacy of the SIP of each State named in a Section 126(b) petition in order to determine whether the SIP complies with Section 110(a)(2)(E) of the Act. Neither the relevant statutory language nor its legislative history supports petitioners' proffered construction; both instead support the reasonableness of EPA's contrary view.

Subsections 110(a)(1) and (3) require EPA to review initial State submissions and proposed SIP revisions to ensure their compliance with eleven specific requirements established by subsection (a)(2), including paragraph (E)'s interstate air pollution requirement. Section 110(a) does not, however, require EPA to initiate its own review of the adequacy of existing SIPs. Nor does the language of paragraph (E) itself suggest that EPA must undertake a "de novo" investigation of the adequacy of all existing SIPs to ascertain which, if any, are inconsistent with that paragraph's prohibition on interstate pollution.

As the court of appeals concluded (Pet. App. A10), moreover, Congress's failure to include such an express requirement in the 1977 Clean Air Act Amendments is particularly telling because in those same amendments, Congress explicitly directed the promulgation of EPA regulations addressing a variety of matters, including new source performance standards, noncompliance penalties, stack height credit, and visibility protection requirements. 42 U.S.C. 7411(f), 7420(a), 7423(c), 7491(a)(4). Congress also directed EPA in those same amendments to undertake other actions, including periodic reassessments of existing ambient standards and new source performance standards. 42 U.S.C. 7409(d)(1), 7411(b)(1)(B). Indeed, as the court of appeals recognized (Pet. App. A10-A11), Section

124 of the Act, which is entitled "Assurance of adequacy of State plans" and was added by the 1977 Amendments, expressly requires EPA to review the adequacy of existing SIPs with regard to dependence by major fuel burning sources on petroleum products and natural gas. 42 U.S.C. 7424. Hence, where Congress wanted EPA to review the adequacy of all existing SIPs, it clearly said so.

The language of Section 126 likewise supports the Administrator's position. Section 126(b) directs EPA to apply Section 110(a)(2)(E)'s prohibition of certain interstate air pollution, but nowhere intimates that doing so requires EPA to review all existing SIPs. It focuses on "major source[s]," not on the adequacy of a State's SIP, and simply requires EPA to conduct a public hearing on a petition and to either deny the petition or make a finding of impermissible interstate pollution "[w]ithin 60 days after receipt of [the] petition" (42 U.S.C. 7426(b)).[5]

Indeed, as the court of appeals explained (Pet. App. A9, A10 (citation omitted)), because Section 126(b) requires EPA to "take final action on a section 126(b) petition very quickly"—within 60 days of the petition's receipt—"[i]t is reasonable to conclude that Congress did not intend that the Administrator be required to perform all these duties in such a short period of time in the absence of the clearest expression." Under petitioner's reading of Section 126(b), however, "the Administrator would be required to engage in an entire array of investigative duties. In particular, the Administrator would be required to undertake a full-scale investigation of the adequacy of the SIPs of all states

[5] Because, moreover, Section 126 directs EPA to apply only Section 110(a)(2)(E)'s "prohibition," and does not provide that EPA must carry out any other requirement of that section, EPA would not have violated Section 126—the sole basis for petitioners' complaint—even if a court were to conclude (contrary to our submission) that Section 110(a)(2)(E) did require EPA to review all existing SIPs.

named in the petition for all pollutants involved, to conduct whatever data-gathering and research is necessary to either prove Petitioners' claims or affirmatively disprove their allegations, and to develop whatever new air pollution models are necessary to confirm or affirmatively disprove Petitioners' modeling theories, as well as conducting a public hearing, analyzing the evidence presented by all interested parties, proposing a determination, considering all comments submitted and promulgating a final rule—all within 60 days of receipt of the petition." Pet. App. A9-A10.[6]

Not surprisingly, the Act's legislative history likewise provides no support for petitioners' proffered construction. There is no general reference to any affirmative duty of the Administrator to review all existing SIPs for compliance with Section 110(a)(2)(E). Nor does the legislative history in any manner suggest that Section 126(b) imposes an affirmative duty upon EPA to review SIPs, to engage in an investigation, or to conduct additional studies before rendering a decision. It is simply not plausible to suppose that Congress, without any mention of it in the legislative history, intended to compel EPA either to undertake the massive task of reviewing all 55 existing SIPs for all six ambient standards or to complete within 60 days the kind of detailed investigation petitioners would require in response to every Section 126 petition.

Finally, there is no merit to petitioners' assertions (Pet. 11, 14) that EPA's construction effectively reads Section 110(a)(2)(E) out of the Clean Air Act. Section 110(a)(2)(E) remains a significant requirement under EPA's view. EPA's review of various SIP revisions submitted by States

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[6] As the court of appeals noted (Pet. App. A10 n.2), however, there is "the possibility of extension pursuant to section 307(d)(10), 42 U.S.C. 7607(d)(10)."

is an ongoing process and under EPA's construction Section 110(a)(2)(E)'s prohibition on interstate air pollution has to be satisfied for the Agency to approve of each revision. In addition, whenever a new NAAQS is promulgated or an existing NAAQS is revised, EPA must ensure that all SIPs and revised SIPs submitted for its review conform to Section 110(a)(2), including paragraph (E)'s prohibition. To be sure, petitioners believe that EPA's review for consistency with Section 110(a)(2)(E) should also be triggered by the filing of a Section 126 petition, but Congress made no provision for such additional review, which is why, as Judge Ruth B. Ginsburg advised (Pet. App. A17), "[t]he judiciary * * * is not the proper place in which to urge alteration of the Agency's course."

2. Contrary to petitioners' claim (Pet. 13-14), the court of appeals' decision does not conflict with the decision of any other court of appeals. In none of the cases upon which petitioners rely, did a court of appeals hold that EPA was required in a Section 126(b) proceeding to investigate the adequacy of the SIPs of all States with sources named by the petition. Indeed, in none of those cases was a court of appeals reviewing EPA's disposition of a Section 126(b) petition. Each case instead involved a challenge, rejected by the court of appeals, to EPA's approval of a revision in another State's SIP. The statements regarding Section 126 made by those courts in their respective opinions, moreover, express no more than the unremarkable proposition, not disputed by EPA or the court of appeals' ruling here, that Section 126(b) provides the proper vehicle for determining whether a "major source" or multiple "major sources" are causing interstate air pollution that contravenes Section 110(a)(2)(E)'s prohibition. See *New York* v. *EPA*, 716 F.2d 440, 445 (7th Cir. 1983); *New York* v. *EPA*, 710 F.2d 1200, 1205 (6th

Cir. 1983); *Connecticut* v. *EPA*, 656 F.2d 902, 907 (2d Cir. 1981).

3. Finally, there is likewise no merit to petitioners' contention that the court of appeals erred in upholding EPA's denial of Maine's petition (Pet. 12). The court of appeals correctly ruled that Maine had "failed to make even a threshold showing of entitlement under § 126(b)" (Pet. App. A13).

The gravamen of Maine's arguments before EPA was that regional haze resulting from pollution transported from midwestern states was impairing visibility at Acadia National Park, which is an area subject to the Clean Air Act's visibility protection requirements (see 42 U.S.C. 7491). See Pet. App. A12-A13. As the court of appeals explained (*id.* at A13), however, because Maine "d[id] not allege that major sources in any other states are interfering with visibility measures contained in its SIP—its SIP does not contain regional haze visibility measures[—]Maine has failed to make even a threshold showing of entitlement under § 126(b)." [7]

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[7] Maine's real complaint is that current EPA visibility protection regulations do not contain federally enforceable measures addressing regional haze (see Pet. 12). As the court of appeals held (Pet. A13 n.3), however, Section 126(b) does not provide litigants such as petitioners with a way to circumvent the Clean Air Act's established procedures for challenging such EPA action (or inaction). Petitioners tacitly concede as much in acknowledging that they have brought a wholly separate proceeding to test "[t]he legality of this regulatory delay" (see Pet. 13 n.8, citing *Maine* v. *Thomas*, 690 F. Supp. 1106 (D. Me. 1988), appeal pending, No. 88-1983 (1st Cir.)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00063